HENRY LOJUNIN

v.

LIDDY LAUMIN & ORS.

HIGH COURT BORNEO, KOTA KINABALU
SYED AHMAD IDID JC
[CIVIL SUIT NO. K 498 OF 1983]
14 JUNE 1991

CIVIL PROCEDURE: *Leave to amend pleadings - Period of limitation - Whether error was genuine mistake - Typographical error - Whether disclosed new cause of action - Determination of real issue - Rules of the High Court 1980, O. 20 r. 5.*

The deceased was a passenger in a vehicle owned by the second defendant D2 and driven by the first defendant D1 when it collided with another vehicle owned by the fourth defendant D4 and driven by the third defendant D3. The plaintiff, as administrator of the deceased's estate, claimed damages for loss of expectation of life and for pain and suffering, special damages and other relief. The action was filed on 2 August 1983.

The plaintiff filed an application for leave under O. 20 r. 5 of Rules of the High Court 1980 (RHC) on 21 July 1987. The period of limitation for the action expired on 1 August 1986. The plaintiff submitted that it was a *bona fide* application to correct a genuine mistake which did not cause injustice to D3 and D4 which could not be compensated by costs. The defendants contended that the mistake was more than a typographical error and argued that the plaintiff's pleadings, as uncorrected, did not disclose any cause of action against D3 and D4.

The issue before the Court was whether leave could be granted to the plaintiff to amend his pleadings.

Held:

[1] The plaintiff who applies for amendment under O. 20 r. 5 has to satisfy the Court that his case is within the defined and limited circumstances set out in subrules (3), (4) and (8). Also, O. 20 r. 5(3) permits "an amendment ... if the Court is satisfied that the mistake sought to be corrected was a genuine mistake and not misleading" and allows the granting of such leave even if the application to the Court was made after any relevant period of limitation.

[2] Correcting the statement of claim from "second defendant" to "third defendant" complies with the requirements of the law as it is for the purpose of determining the real question in controversy between the parties.

[Order in terms of plaintiff's application granted.]

Cases referred to:

Hock Hua Bank Bhd. v. Leong Yew Chin (t/a West Malaysia Frozen Food Co.) [1987] CLJ (Rep) 126 ***(cit)***

Govt. of Malaysia v. Mohamed Amin bin Hassan [1986] 1 MLJ 224 ***(dist)***

Legislation referred to:

Rules of the High Court 1980, O. 20 r. 5

Other sources referred to:

Bullen & Leake & Jacob's Precedents of Pleadings, 13th Edn., 678, 679, 808, 818-821
Mallal's Supreme Court Practice
The Supreme Court Practice 1985 para 20/5-8/6 p. 340

For the Plaintiff - Lee Hai Fong; M/s. Lee & Thong Co.
For the 3rd & 4th Defendants - Caroline C.K. Liau; M/s. Wong Yapp Chung & Co.

JUDGMENT

Syed Ahmad Idid JC:

The plaintiff filed the writ of summons on 24 November 1983 and claimed damages:

(1) on behalf of the estate of the deceased;
(2) the sum of RM7,500 as funeral expenses;
(3) the sum of RM3,500 as legal fees;
(4) interests;
(5) costs and other remedies.

On 2 August 1983, according to the indorsement of claim, the deceased was a passenger in a pick-up truck registration No. SA5052 A belonging to the 2nd defendant and being driven by the 1st defendant along the Kasigui bridge in the direction of Donggongon from Kolopis. At the said bridge a lorry registration No. SA5488 B driven by the 3rd defendant and owned by the 4th defendant collided with the said SA5052 A.

The claim further stated that in consequence of the collision Jenny Henry Lojunin suffered death and the estate of the deceased suffered damage in that the deceased was deprived of the expectation of life to which she was entitled and the estate suffered damage in that they have been deprived of other benefits including pecuniary benefits which they would have received had the deceased continued to live.

The plaintiff as administrator of the Estate of Jenny Henry Lojunin, deceased, brought this action for the benefit of the deceased's estate for damages for the deceased's loss of expectation of life and for pain and suffering. Letters of administration was granted on 21 November 1983.

On 21 July 1987 the plaintiff filed a summons-in-chambers application under O. 20 r. 5 for leave to amend the writ of summons dated 24 November 1983 by substituting the words "second defendant" with the words "third defendant" as appear in para. 5 of the statement of claim to include in the prayer after the words "claims damages" the following words "against the first, second, third and fourth defendants".

This matter has come to Court on more than five occasions and it was finally heard and concluded on 17 May 1991. Even at that late stage, Miss Caroline Liau, Counsel for both the 3rd and 4th defendants, raised a preliminary objection because, according to her, plaintiff had not specified the subrule of O. 20 r. 5 under which he has applied for the amendment. Miss Liau then quoted Rules of the High Court 1980 and *Mallal's Supreme Court Practice* in support. She added that "as at to date the period of limitation for the action has expired on 1 August 1986". She also said that "it is imperative that the plaintiff applies under the relevant subrule in order to invoke the Court's assistance".

I overruled the preliminary objection by 3rd and 4th defendant's Counsel.

The hearing then proceeded on the plaintiff's summons-in-chambers application under O. 20 r. 5. Learned Counsel for the plaintiff informed the Court that the amendment prayed for is in respect of para. 5 of the statement of claim. According to Miss Lee, the amendment applied for does not raise a new cause of action. It merely corrects some genuine typing mistakes. Even if it does raise a new cause of action (which she denied), it comes within O. 20 r. 5(5) of the Rules of the High Court 1980. She added that from paras. 2 and 3 of the statement of

claim, it is clear that the 1st and 3rd defendants were the drivers of the vehicles involved in the collision. And the particulars of negligence stated in para. 5 clearly showed that the collision was caused by the negligence of the drivers of the two vehicles, namely the 1st and 3rd defendants. Thus the word '2nd defendant' in para. 5 should read as '3rd defendant'. Due to typing mistakes, the word '2nd defendant' was inserted instead of '3rd defendant'.

Miss Lee quoted O. 20 r. 5(5) of the Rules of the High Court 1980 and *Hock Hua Bank Bhd. v. Leong Yew Chin* (*t/a West Malaysia Frozen Food Co.*) [1987] CLJ (Rep) 126 where Abdul Hamid, then acting LP Malaysia, succinctly stated:

> As for the general principles for the granting of leave to amend:
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> It is a guiding principle of cardinal importance on the question of amendment that, generally speaking, all such amendments ought to be made "for the purpose of determining real question in controversy between the parties to any proceedings or of correcting any defect or error in any proceedings. (see per Jenkins LJ in *G.L. Bakar Ltd. v. Medway Building & Supplies Ltd.* [1958] 1 WLR 1216, p. 1231; [1958] 3 All ER 540, p. 546).
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> It is a well established principle that the object of the Court is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights ... I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or grace ... It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected if it can be done without injustice, as anything else in the case is a matter of right.' (per Bowen LJ in *Cropper v. Smith* [1883] 26 Ch D 700 pp. 710-722, with which observations A.L. Smith LJ expressed "emphatic agreement" in *Shoe Machinery Co. v. Cultam* [1896] 1 Ch. 108, p 112).
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> In *Tildesley v. Harper* [1876] 10 Ch D 393, pp. 396-397 Bramwell LJ said:
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> My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting *mala fide*, or that, by his blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise. (*The Supreme Court Practice 1985* para. 20/5-8/6 p. 340).

The plaintiff urged the Court to exercise its power in granting leave applied for as it was a *bona fide* application to correct some genuine mistakes and it did not cause injustice to the 3rd and 4th defendants which could not be compensated by costs.

In reply, Miss Liau said this was not a mere typographical error. The defective pleadings as they stood did not disclose a cause of action against the 3rd and 4th defendants. She referred to the statement of claim and argued on:

(a) paragraph 5 of the statement of claim failed to state that the collision was caused by the 3rd defendant or that he was negligent, which would have the effect of invoking a vicarious liability on the part of the 4th defendant.

(b) relief was not claimed against the 3rd and 4th defendants in that the plaintiff failed to claim damages against all the defendants in the prayer.

(see *Bullen & Leake & Jacob's Precedents of Pleadings*, 13th Edn., pp. 678, 679, 808, 809, 818-821).

Miss Liau explained that in *Government of Malaysia v. Mohamed Amin bin Hassan* [1986] 1 MLJ 224, the respondent first brought an action on behalf of his son, deceased, then sought to amend the pleadings to add himself and his wife as parties to the action. Leave was granted to respondent only as to the amendment. On appeal by the appellant (defendants), the appeal was allowed. The then CJ Borneo, Justice Lee Hun Hoe, said this on p. 227:

> What the respondent did was not correcting the name of a party. Neither was it a matter of mistake. It was merely the addition of a new and different party. This is not permissible under any provision of the O. 15 r. 1, particularly when the period of limitation affecting the proposed plaintiff had expired. This is not a case of altering a party suing in his representative capacity into his personal capacity. It is a case of adding a new party to the original suit...

Miss Liau cited the unreported judgment of Charles Ho J in *Perniagaan Kinabalu (Sabah) Sdn. Bhd. v. Sabah Match Factory Sdn. Bhd.* (civil suit no. 421 of 1975 at Kota Kinabalu) which states:

> The plaintiff who applies for amendment under O. 20 r. 5 has to satisfy the Court that his case is within the defined and limited circumstances set out in subrules (3), (4) and (8).

I agree with this and it seems to support the plaintiff's application in that O. 20 r. 5(3) permits "an amendment ... if the Court is satisfied that the mistake sought to be corrected was a genuine mistake and not misleading...". Order 20 r. 5(2) allows the granting of such leave ... even if the application to the Court was made after any relevant period of limitation.

The affidavit-in-support of Douglas C. Primus was clear as to what had occurred. The case of the *Government of Malaysia v. Mohamed Amin bin Hassan* (*supra*) is not on all fours with this case as here the plaintiff merely wishes to change or correct figures, that is, "second" to "third" defendant. The third defendant was already mentioned in the statement of claim as long ago as 24 November 1983. By correcting from "second" to "third", it complies with the requirements of the law, that is, the amendment is for the purpose of determining the real question in controversy between the parties.

I therefore grant the summons-in-chambers in terms of the application under O. 20 r. 5 dated 21 July 1987 and I order accordingly.

Also found at [1991] 3 CLJ 2161